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No. 305

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1964.

ANA DEL VALLE, ET AL.,
Petitioners,

vs.

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL-CIO AND MARCEL A. KENNEY, TRUSTEE,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

J. W. Brown
6 East Fourth Street
Cincinnati, Ohio 45202
Attorneys for Respondents

Benjamin Gettler
Jonas B. Katz
Of Counsel

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STATUTES INVOLVED

Labor Management Reporting and Disclosure Act of 1959, P. L. 86-257 Sept. 14, 1959, 73 Stat. 519 et seq. 29 U.S.C. 401, et seq.

Section 304 (29 U.S.C. 464)

(a) Upon the written complaint of any member or subordinate body of a labor organization alleging that such organization has violated the provisions of this title (except section 301) the Secretary shall investigate the complaint and if the Secretary finds probable cause to believe that such violation has occurred and has not been remedied he shall, without disclosing the identity of the complainant, bring a civil action in any district court of the United States having jurisdiction of the labor organization for such relief (including injunctions) as may be appropriate. Any member or subordinate body of a labor organization affected by any violation of this title (except section 301) may bring a civil action in any district court of the United States having jurisdiction of the labor organization for such relief (including injunctions) as may be appropriate.

(b) For the purpose of actions under this section, district courts of the United States shall be deemed to have jurisdiction of a labor organization (1) in the district in which the principal office of such labor organization is located, or (2) in any district in which its duly authorized officers or agents are engaged in conducting the affairs of the trusteeship.

(c) In any proceeding pursuant to this section a trusteeship established by a labor organization in conformity with the procedural requirements of its constitution and bylaws and authorized or ratified after a fair hearing either before the executive board or before such other body as may be provided in accordance with its constitution or bylaws shall

be presumed valid for a period of eighteen months from the date of its establishment and shall not be subject to attack during such period except upon clear and convincing proof that the trusteeship was not established or maintained in good faith for a purpose allowable under section 302. After the expiration of eighteen months the trusteeship shall be presumed invalid in any such proceeding and its discontinuance shall be decreed unless the labor organization shall show by clear and convincing proof that the continuation of the trusteeship is necessary for a purpose allowable under section 302. In the latter event the court may dismiss the complaint or retain jurisdiction of the cause on such conditions and for such period as it deems appropriate.

Section 306 (29 U.S.C. 466)

The rights and remedies provided by this title shall be in addition to any and all other rights and remedies at law or in equity: *Provided,* That upon the filing of a complaint by the Secretary the jurisdiction of the district court over such trusteeship shall be exclusive and the final judgment shall be res judicata.

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HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL-CIO AND MARCEL A. KENNEY, TRUSTEE,
Respondents.

BRIEF TO THE UNITED STATES SUPREME COURT

STATEMENT OF THE CASE

The facts in the instant case are largely uncontroverted. However, since petitioners have omitted some essential details, a brief restatement of the case is necessary.

On March 14, 1963, petitioners, purporting to be some one hundred and fifty-five (155) members in good standing of Local 610 of the Hotel and Restaurant Employees and Bartenders International Union, filed a petition against respondents in the District Court for the District of Puerto Rico to terminate the trusteeship of Local 610 which had existed for more than eighteen months.

Petitioners invoked the jurisdiction of the District Court under Title III, Secs. 304 and 306[1] of the Labor Management Reporting and Disclosure Act, hereinafter referred to as LMRDA (Petition paragraph II, (Rr[2] p. 1a). The petition contained, *inter alia*, the bare legal conclusion that the trusteeship was maintained "in violation of the constitution and by-laws of the International as well as in violation of the provisions of Sections 304 and 306."

Among other relief, the petitioners requested the appointment of a monitor to receive the assets and administer the affairs of Local 610.

At the time of the filing of the petition, an ex parte order was obtained directing the respondents to appear before the Court on the 20th day of March, 1963, "to show cause why the temporary restraining order prayed for in the petition should not be issued . . ." (Rr p. 9a). At the direction of the Court, the cause was continued to March 21, 1963, at which time respondents appeared as directed by the order to show cause.

At the hearing, the respondents announced that the trusteeship was being terminated and that the respondent International Union was proceeding to have the trustee conduct an election of officers in accordance with its constitution. The petitioners objected to the fact that the trustee would conduct the election, and considerable argument on the authority of the court followed in which the court attempted to have the parties stipulate a consent order. When respondents declined to enter into the type of stipulation suggested, the court summarily advised respondents that since no "answer" or "return" had been filed to the order to show cause, the court would presume the allegations of the petition to be true, and would enter

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[1] 29 USC 464 and 466.

[2] Respondents Additional Record, filed herewith. Reference to record printed by petitioner is designated "Pr."

an order without requiring presentation of any evidence by petitioners (Rr p. 28a). At the same time the court refused respondents any opportunity to present evidence (Rr p. 27a, 29a).

On the following day, March 22, 1963, the Court entered an order appointing a monitor "to conduct and supervise the election of officers of Local 610 and to supervise the cessation of the trusteeship." (Rr p. 33a). Contrary to the assertion of the petitioners, the respondents objected to the order, and specifically challenged the authority of the Court to appoint a monitor, which objection was noted on the face of the order as follows:

> "This order is entered despite the fact that respondents have objected to it for the following reasons: (1) The order is beyond the scope of the show cause order entered by the Court and beyond the relief requested by the complainant; (2) The Court does not have jurisdiction or authority to order the appointment of a monitor under the provisions of the law upon which the complaint was filed, and for such other reasons as were raised in open court." (Rr p. 33a)

Respondents thereafter requested that petitioners be required to post an injunction bond which the Court ordered on March 26, 1963 (Rr p. 34a). On May 1, 1963, respondents made application to increase said bond which was denied (Rr p. 37a, 38a).

Notice of Appeal from the aforementioned order of March 22 was filed on April 11, 1963, and the appeal was heard on February 3, 1964. During the pendency of the appeal respondent complied with the directions and intent of the order of the District Court by: obeying the orders of the monitor in the conduct of the election of May 26, 1963 (while objecting to his ruling on voting eligibility (Pr 32, 44)); by installing the officers so elected;

and by turning over the affairs of the local union to said officers. At the time of the appeal below, the officers elected pursuant to the court order were continuing to act.

On March 6, 1964, the Court of Appeals issued an opinion and decision (Pr p. 23) setting aside that portion of the District Court's order which appointed a monitor to conduct the election of union officers. Although the Court indicated but did not rule directly that the District Court did not have authority to appoint a monitor in trusteeship cases, (opinion, fn. 2, Pr. p. 23), it did hold that such an appointment was not automatic. The Court found as a matter of fact that the "record disclosed no special reason for the appointment of a monitor," that no such reason was alleged, and that the District Court had proceeded on the basis that the burden was on respondents to show the contrary.

ARGUMENTS

Petitioner has raised and argued five "questions presented" to which respondents herewith reply.

1. Petitioners' Question I suggests that the decision of the First Circuit is in direct conflict with decisions of other Circuits. Petitioners ingeniously reason that when the Court of Appeals set aside the order appointing the monitor, thereby nullifying the election conducted by him, it assumed to act in a union election matter in a manner contrary to the procedure provided under Title IV, Sec. 402[3] of the LMRDA. This objection to the exercise of the Court's appellate jurisdiction is without merit. The Court was not interfering in any election, it

[3] 29 U.S.C. Sec. 482.

was correcting the interference of the District Court, the same error of which petitioners now complain.

The cases cited by petitioners as "conflicting"[4] hold that only Sec. 402 confers authority on U. S. District Courts to deal with union elections, and then only upon complaint by the Secretary of Labor. The instant decision refusing to permit the District Court to interfere in an election on complaint of individual union members under Secs. 304 and 306 is, therefore, in accord, and not conflicting.

2. Questions II and III relate to the question of mootness. Petitioners' motion on the matter of mootness does not suggest any recent change of the status of the case. Rather, it appears that the purpose of the motion is to introduce evidence in this court which petitioners failed to present to the court below,[5] and which should not now be considered by this Court. *Edward Hine Yellow Pine Trustees* v. *Martin*, 268 U.S. 458; *Roemer* v. *Simon*, 91 U.S. 149.

In essence, petitioners urge that the Court of Appeals erred in not finding the controversy presented to it to be moot. Review of this alleged error is hardly a matter of concern to this court in exercising its certiorari jurisdiction. It does not involve a conflict of decisions of the Court of Appeals; it is not an important question of federal law which should be decided by the Court, and is not a federal question in conflict with the decisions of the Court. Mootness is scarcely a question for a petitioner

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[4] *Mamula* v. *United Steel Workers*, 304 F. 2d 108 (CA 3, 1962) cert. denied, 371 U.S. 823; *Colpo* v. *Highway Truck Drivers and Helpers, Local* 107, 201 F. Supp. 307 (D.C. Del. 1961) vacated as moot 305 F. 2d 362 (CA 3, 1962), cert. denied, 371 U.S. 890 (1962); *Robins* v. *Barback*, 325 F. 2d 929 (CA 2, 1963).

[5] This evidence consists of documents dated June 3, 1963, to October 18, 1963, which could have presented to the Court of Appeals in ample time for the oral argument in that Court on Feb. 3, 1964.

to raise since if a case is moot, this court should not take the futile act of granting certiorari. Mootness is, therefore, a defense against the granting of certiorari, not an affirmative argument in favor of its grant.

Furthermore the facts show that the Court of Appeals below did not depart from the accepted and usual course of judicial proceedings so as to call for an exercise of this court's power of supervision. The respondents were confronted with an injunctive order directing the appointment of a monitor to conduct and supervise an election of officers. Respondents excepted to this order, insisted upon an injunction bond, and filed timely notice of appeal. While the appeal was pending, respondents were required to comply with the order by turning over the administration of the local union to those persons elected in the monitor-conducted election to which respondents objected. At the time of the appeal, the persons so elected were continuing to act as officers of the Union and now continue so to act.[6] Accordingly there was and is a case and controversy. Certainly mere obedience to a contested court order, like compliance with contested violations of law, does not render the contested matter moot. cf: *Walling* v. *Helmerich & Payne*, 323 U.S. 37, 42, 43; *Federal Trade Commission* v. *Goodyear Tire & Rubber Company*, 304 U.S. 257; *Curcio* v. *The United States*, 354 U.S. 118.

3. Question IV seeks to raise the issue of the authority of District Courts to appoint a monitor to direct and supervise elections under Title III (Trusteeships) of the LMRDA. The decision of the Court of Appeals, however, does not give rise to this issue. The Court found as a matter of *fact* as follows:

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[6] The District Court stayed execution of the judgment of Court of Appeals pending outcome of the instant petition. (Pr. p. 20)

> "While monitorships may be an acceptable, equitable device . . . the record discloses no special reasons for invoking that relief here. Indeed none are even alleged. The court seems to have proceeded on the basis that the burden was upon respondent to show the contrary." (Pr. p. 23).

The decision therefore rests on a finding of fact that the record discloses no special reason for the appointment of a monitor. Since no evidence whatsoever was presented to the District Court (Rr p. 10a - 32a), this finding is beyond dispute, and is certainly not a matter to which the court will address itself in exercising its discretionary jurisdiction. *General Talking Pictures Corp.* v. *Western Electric,* 304 U.S. 175; *United States* v. *Johnson,* 268 U.S. 220.

Even if the authority to appoint a monitor is raised by the decision below, the lack of such authority is so clear, and the circumstances of the instant cause so unusual, that this court should not be required to speak on the matter. In the statutory scheme of the LMRDA it is clear that in actions under Title III, Secs. 304 and 306 of the Act, the District Court may only grant such relief as is appropriate to correct the violation of that title, and to decree termination of trusteeships. All authority of District Courts over union elections is contained in Title IV of the Act which, in contrast to Title III, specifically grants to the court detailed authority regarding the election of union officers.

Under Section 402 (c)[7] of Title IV. District Courts at the request of the Secretary of Labor, have authority to preserve assets of the union to declare elections void and to direct new elections under supervision of the Secretary of Labor. The statute and its legislative history make it clear, however, that Congress intended to limit the exer-

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[7] 29 U.S.C. Sec. 482 (c).

cise of this authority to the correction of elections already conducted[8] and only when requested to act by the Secretary of Labor.[9] Nothing in the legislative history suggests that the rule be any different merely because the elections are in connection with the dissolution of a trusteeship. The detailed authority to deal with election matters under Title IV and the absence of any such authority under Title III invokes the rule of statutory construction: *expressio unius est exclusio alterius. Ginsberg & Sons* v. *Popkins*, 285 U.S. 204, 208.

In the instant case the errors of the District Court were crystal clear. It acted in an initial election where no violation of the election provisions of the Act were claimed, it acted at the instance of individual union members rather than the Secretary of Labor, and it directed an election under the supervision of a monitor rather than the Secretary of Labor. The errors occurred under circumstances

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[8] The Senate Report on S. 1555 which contained the exact provision finally enacted as Sec. 402, stated as follows:

> "In filing a complaint the member must show that he has pursued any remedies available to him within the union and any parent body in a timely manner. This rule preserves a maximum amount of independence and self-government by giving every international union the opportunity to correct improper local elections." (Senate Report 187, 86th Congress First Session, p. 21; Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, Volume I, page 417.)

[9] Under H.R. 8342 as originally passed by the House, individual union members were given rights to enforce the election provisions of the Act. In conference this provision was removed, and the Senate version substituted. In reporting back to the Senate, Senator Kennedy stated:

> "The provisions requiring fair and periodic elections are taken from the Senate bill. The Landrum-Griffin Bill would have substituted a variety of suits by individual members for enforcement by the Secretary of Labor. The House conferees receded from this position and the Senate provision was restored." (Congressional Record, Senate, Sept. 3, 1959, page 16415; Legislative History of the Labor-Management Reporting & Disclosure Act of 1959, Volume II, page 1433).

The Circuit Courts are in agreement. See footnote 4 *supra*.

which are not likely to reoccur with any frequency, and they have now been corrected by the Court of Appeals. Under these circumstances further review by this court is neither required nor justified.

4. The final question of petitioners deals with the right of the Court of Appeals to review the interlocutory order in question. The Court found that the order was in "substantial effect" an injunction (Pr. p. 23). The District Court obviously was of the same opinion since it required petitioners to post an injunction bond pursuant to Rule 65 (c) of the Rules of Federal Procedure (Rr p. 34a). The Court having so found, its authority to exercise appellate jurisdiction is specifically conferred by 28 USC Sec. 1292 (1).

For all the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

J. W. Brown
6 East Fourth Street
Cincinnati, Ohio 45202
Attorneys for Respondents

Benjamin Gettler
Jonas B. Katz,
Of Counsel